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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

16 FEDERAL TRADE COMMISSION,
17 Plaintiff,
18 v.
19 AMG SERVICES, INC., *ET AL.*,
20 Defendants, and
21 PARK 269 LLC, *ET AL.*,
22 Relief Defendants.

Case No.: 2:12-CV-536-GMN-(VCF)

**DEFENDANTS' MOTION TO EXCLUDE
EVIDENCE NOT DISCLOSED AS
REQUIRED UNDER RULE 26(a)(1)**

1 Pursuant to Federal Rules of Civil Procedure 26(a)(1) and 37(c), defendants AMG
 2 Services, Inc., SFS, Inc., Red Cedar Services, Inc., and MNE Services, Inc., move this Court
 3 to enter an order (1) finding that the FTC breached its obligation under Rule 26(a)(1) to
 4 disclose the witnesses whose statements are contained in the FTC's Motion for Summary
 5 Judgment Exhibits 75, 80–92, 112–17, 125–62, 167–68, and 184–89;¹ and (2) excluding from
 6 evidence statements by consumers the FTC failed to properly disclose as required under Rule
 7 26(a)(1), including for purposes of the FTC's Motion for Summary Judgment, other motions,
 8 or any subsequent trial. In support of this motion, defendants state as follows:

9 1. As set forth in great detail in *Defendants' Rule 56(c)(2) Objection to FTC*
 10 *Evidence, or in the Alternative, Rule 56(d) Motion for Additional Discovery* (ECF No. 498),
 11 the FTC grossly violated its discovery obligations under Rule 26(a)(1) by failing to disclose
 12 the identity of a large number of consumers whose hearsay statements the FTC intended to
 13 rely on to support its claim.²

14 2. Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires parties to disclose
 15 “the name and, if known, the address and telephone number of each individual likely to have
 16 discoverable information—along with the subjects of that information—that the disclosing
 17 party may use to support its claims or defenses.”

18 3. In the memorandum supporting its Motion for Summary Judgment (ECF No.
 19 456), well after the close of discovery, the FTC cited and relied for the first time on a number
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 24 ¹ Unless otherwise noted, exhibit numbers refer to documents filed with the FTC's motion for summary judgment
 25 (ECF No. 455). See Exhibits 167 and 168 (consumer complaints); Exhibits 80–92, 125–62, and 184–89
 26 (recordings and transcriptions of consumers' calls to the defendants); and Exhibits 75, 112–117 (former AMG
 27 employees' statements purporting to recount statements consumers allegedly made to them on the telephone).

28 ² This motion incorporates all of the facts and arguments found in *Defendants' Rule 56(c)(2) Objection to FTC*
 29 *Evidence, or in the Alternative, Rule 56(d) Motion for Additional Discovery* (ECF No. 498).

1 of hearsay statements by consumers whose identity had never been disclosed to Defendants as
 2 required by Rule 26(a)(1).

3 4. Federal Rule of Civil Procedure 37(c) provides, “If a party fails to provide
 4 information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to
 5 use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless
 6 the failure was substantially justified or is harmless.”³ As a court in this circuit recently
 7 explained, “Parties, aware of the ‘self-executing’ and ‘automatic’ nature of Rule 37(c)(1)
 8 sanctions, have a right to expect that only disclosed witnesses will be used to support the
 9 disclosing party’s claims and defenses. They should be able to rely on Rule 26 disclosures.”

10 11 *Rhodes v. Sutter Health*, No. CIV. 2:12-0013, 2013 WL 425404, at *10 (E.D. Cal. Feb. 1,
 12 2013).

13 14 5. The FTC’s failure to disclose these witnesses is far from harmless—it deprived
 15 Defendants of any opportunity to conduct discovery to test or challenge the veracity of their
 16 statements—and it cannot be justified: the FTC knew these consumers’ names throughout
 17 discovery (and in many cases before filing this suit), yet it never saw fit to disclose them
 18 (despite repeatedly amending its disclosures, including most recently the FTC’s Fifth Amended
 19 Rule 26(a)(1) Disclosures, dated on August 6, 2013).

20 21 6. Rule 37(c)(1) therefore automatically bars the FTC from using that “information
 22 or witness[es] to supply evidence on a motion, at a hearing, or at a trial.”

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 25 3 See also Fed. R. Civ. P. 26(g) (1) (every disclosure under Rule 26(a)(1) must be signed, which certifies that to
 26 the best of the person’s knowledge after reasonable inquiry “with respect to a disclosure, it is complete and
 27 correct at the time it is made”); Fed. R. Civ. P. 26(g)(3) (“If a certification violates this rule without substantial
 28 justification, the court, on motion or on its own, must impose appropriate sanction on the signer, the party on
 whose behalf the signer was acting, or both.”).

1 Accordingly, defendants respectfully move the Court to grant their motion and:

2 (1) find that the FTC failed to disclose, as required by Rule 26(a)(1)(A)(i), the names of
3 consumers whose statements are found in Exhibits 167, 168, 80–92, 125–62, 184–89, 75, and
4 112–17 to the FTC’s Motion for Summary Judgment; and

5 (2) exclude from evidence statements by those undisclosed consumers, for purposes of
6 the FTC’s Motion for Summary Judgment (including paragraphs 69, 70, 71, 72, 84, 85, 86, 88,
7 and 90 of the FTC’s statement of material facts (ECF No. 456, at 4–38)), other motions, or any
8 subsequent trial.

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10 IT IS SO ORDERED:

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13 UNITED STATES MAGISTRATE JUDGE

14 DATED: _____

15 Dated: December 3, 2013

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17 /s/ David J. Merrill
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CERTIFICATE OF SERVICE

2 Pursuant to Federal Rule of Civil Procedure 5(b), I hereby certify that on the 3rd day of
3 December 2013, I submitted the foregoing *Defendants' Motion To Exclude Evidence not*
4 *Disclosed as Required Under Rule 26(a)(1)* electronically for filing and service with the United
5 States District Court of Nevada. Service of the foregoing document shall be made to all counsel
6 of record via electronic case filing.

/s/ Bradley H. Weidenhammer